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No. 99-1554

In the Supreme Court of the United States

JOHN ARENA AND MICHELLE WENTWORTH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners' use of violence to induce providers of reproductive health services to stop providing those services violated the Hobbs Act, 18 U.S.C. 1951.

2. Whether the court of appeals correctly rejected petitioner Arena's allegations of judicial bias and ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 180 F.3d 380. The two decisions of the district court (Pet. App. 40a-56a, 57a-94a) are reported at 918 F. Supp. 561 and 894 F. Supp. 580.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1999. A petition for rehearing was denied on December 22, 1999 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on March 21, 2000, and placed on the Court's docket on March 23, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioners John Arena and Michelle Wentworth were each found guilty of two counts of extortion and one count of conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, for their attacks on medical facilities that provide reproductive health services. Arena and Wentworth were sentenced to 41 and 37 months' imprisonment, respectively, to be followed by three years of supervised release. They also were ordered, jointly and severally, to pay restitution in the amount of $52,062.11. The court of appeals affirmed. Pet. App. 1a-35a.

1. a. On April 13, 1994, petitioners met with Michelle Campbell, Wentworth's daughter, to discuss the possibility of paying Campbell to pour butyric acid in various clinics that provide abortion services, beginning with the Planned Parenthood Center of Syracuse, New York.[1] Campbell agreed to conduct the attacks and to be paid at a rate of $100 per facility. Arena then provided Campbell with latex gloves, mouthwash to eliminate any traces of odor on Campbell's hands after pouring the acid, and a large bottle of butyric acid. Arena also instructed Campbell to pour the acid inside Planned Parenthood during business hours, so that the odor would force the facility to close. Wentworth suggested that the acid should be poured into the

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[1] "Butyric acid is a hazardous liquid that emits a powerful, rancid odor. Exposure to its fumes can cause irritation to the eyes and respiratory tract; ingestion of the liquid can cause burns to the gastrointestinal tract; and contact with the liquid can cause severe burns to the skin and eyes." Pet. App. 2a.

ventilation system to force the facility to close for several days. Pet. App. 3a.

On April 14, 1994, Campbell entered Planned Parenthood, went into a restroom, and poured butyric acid onto a wall and into a heating duct of the facility. Shortly after Campbell left Planned Parenthood, a foul and overpowering smell spread throughout the facility. Within 15 minutes, the fire department evacuated from the facility approximately 30 employees and 10 patients. A number of the evacuated persons experienced headaches, nausea, and other physical effects from the exposure to the fumes. Pet. App. 4a-5a.

Planned Parenthood was forced to close for the remainder of the day and to initiate a long and costly cleanup effort. The environmental contractor remained on the premises for more than a week to clean all exposed surfaces and to remove, *inter alia*, ventilation ducts, flooring, bathroom fixtures, ceiling tiles, draperies and carpeting. The clinic's normal operations did not resume until ten days after the attack. Numerous patients also informed the clinic that they were afraid to visit the clinic and that they would seek medical services elsewhere. Pet. App. 5a.

b. In May 1994, Campbell agreed to conduct a similar attack of the offices of Dr. Jack E. Yoffa, a provider of abortion services in the Syracuse area. Wentworth provided Campbell with a car, a map, pictures of Yoffa's building, butyric acid, and other supplies needed for the attack. Pet. App. 6a.

On May 19, 1994, Campbell carried the butyric acid to Dr. Yoffa's offices. Unable to find a suitable air duct, Campbell poured the acid on the floor. As a result, several dozen patients and employees were evacuated from the facility and the offices were forced to close. An environmental contractor that was hired to clean

the premises worked at the site for approximately one month. Although Dr. Yoffa resumed his practice, the noxious odor was never completely removed from his offices, and many patients refused to return to the premises. Pet. App. 7a.

2. In June 1994, local law enforcement officials arrested Campbell, who agreed to cooperate with police. Arena and Wentworth were each charged, in state court, with two felony counts of criminal mischief, one misdemeanor count of conspiracy and two misdemeanor counts of public endangerment. Arena pled guilty to all counts, and a jury convicted Wentworth of all charges except the public endangerment counts, which the prosecution withdrew before trial. Arena and Wentworth were each sentenced to five years' probation. Pet. App. 7a-8a.

A federal grand jury subsequently indicted petitioners on one count of conspiring to obstruct interstate commerce and two counts of obstructing interstate commerce by committing extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.[2] The jury convicted petitioners on each count. Pet. App. 9a, 57a.

3. The court of appeals affirmed. Pet. App. 35a. The court of appeals rejected (*id.* at 10a-25a) petitioner Wentworth's contention that her conduct did not

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[2] Petitioners' conduct occurred before the effective date of the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694, which imposes criminal penalties on a person who "by force or threat of force * * *, intentionally injures, intimidates or interferes * * * with any person because that person is or has been * * * obtaining or providing reproductive health services," or on whoever "intentionally damages or destroys the property of a facility * * * because such facility provides reproductive health services." 18 U.S.C. 248(a)(1) and (3).

constitute "extortion" under the Hobbs Act.[3] The court of appeals also rejected petitioner Arena's claims that he was deprived of his right to effective assistance of counsel, *id.* at 27a-29a, and that the district judge should have recused himself because of bias, *id.* at 29a-31a.

ARGUMENT

1. Petitioners contend (Pet. 5-25) that their Hobbs Act convictions should be reversed because their conduct fails to satisfy the elements of "extortion," which the Act defines as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Petitioners do not contend, however, that there is a conflict in the circuits on the meaning of the elements of extortion under the Hobbs Act, and we are not aware of any. In any event, the court of appeals correctly construed the elements of extortion under the Hobbs Act to apply to petitioners' conduct.

a. Petitioners argue (Pet. 16-17) that the court of appeals erred in holding that the term "property" under the Hobbs Act includes the "right to conduct business free from wrongful force, coercion or fear." Neither petitioner raised that contention, however, before the district court or the court of appeals. Indeed, Went-

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[3] The court of appeals also rejected Wentworth's claims that the federal prosecution violated her Double Jeopardy rights, Pet. App. 31a-33a; that the district court abused its discretion by excluding certain impeachment testimony, *id.* at 33c; that the district court improperly instructed the jury regarding Wentworth's state court convictions, *id.* at 34a; and that Wentworth was entitled to a new sentencing proceeding, *id.* at 34a-35a. Wentworth does not challenge those rulings in this Court.

worth, the only petitioner to raise in the court of appeals the issue whether petitioners' conduct met the statutory elements of extortion, conceded that the term "property" included "the right to conduct a lawful business free from threats and violence." Pet. App. 17a (citing Wentworth C.A. Br. 31); see also *id.* at 67a (district court opinion) ("The court starts from the uncontested precept that the right to conduct a lawful business free from threats and violence is property within the meaning of the Hobbs Act."). This Court should therefore decline to review an issue explicitly conceded below.

In any event, petitioners erroneously assume (Pet. 16) that the term "property" rights may include only tangible physical assets. Indeed, the court of appeals' interpretation of the term "property" under the Hobbs Act is consistent with the decision of every other court of appeals that has addressed the issue and similarly held that the term "property" encompasses intangible rights, including the right to conduct business free from violence or threatened violence. See *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1349-1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979).[4]

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[4] Petitioners' reliance (Pet. 16-17) on *McNally* v. *United States*, 483 U.S. 350 (1987), is misplaced, as that decision simply interpreted the term "property" under the mail fraud statute, 18 U.S.C.

b. Petitioners also argue (Pet. 7-15) that the term "obtaining" requires that petitioners either receive a direct payment from the victim or cause a third person to benefit financially. That contention lacks merit.

Extortion occurs when the defendant forces his victim to choose between abandoning his property rights or suffering the consequences of the defendant's violence or threat of violence. See Pet. App. 22a ("the Hobbs Act definition of extortion simply prohibits the extortionist from forcing the victim to make * * * a choice" between "relinquishing some property immediately or risking unlawful violence resulting in other losses"). Here, petitioners "obtained" their victims' property by using violence and the threat of future violence (1) to force the victims to abandon their premises and (2) to direct and control how their victims in the future would conduct their business, namely by ceasing to provide abortion services.

Nothing in the text of the Hobbs Act imposes a requirement that the government prove an element of financial gain or motive. Cf. *National Org. for Women* v. *Scheidler*, 510 U.S. 249, 257 (1994) (holding that RICO does not require proof that the racketeering enterprise and the predicate acts of racketeering were motivated by an economic purpose, reasoning that "[n]owhere [in the text of RICO] is there any indication

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1341, not to encompass the right of the citizenry to good government. That interest, however, is far more intangible than a right to conduct a business free from violent interference. See also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (holding that the term "property" under Section 1341 includes business' intangible right to confidential information). And see 18 U.S.C. 1346 (overruling *McNally* by extending the prohibition of 18 U.S.C. 1341 to "a scheme or artifice to deprive another of the intangible right of honest service").

that an economic motive is required"). Nor does the term "obtaining" require that the extortionist personally receive any benefit from his actions. See *United States* v. *Green*, 350 U.S. 415, 420 (1956) ("[E]xtortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property."). Nor does that term require that the defendant cause a financial benefit to a third party, "for obtaining includes 'attain[ing] . . . disposal of,' Webster's Third New International Dictionary 1559 (1976); and 'disposal' includes 'the regulation of the fate . . . of something,' id. at 655." Pet. App. 20a. Thus, "even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless 'obtain[ed]' that property if she has used violence to force her victim to abandon it." *Ibid.*[5]

It is irrelevant that petitioners' victims refused permanently to relinquish their business, because the Hobbs Act by its terms covers attempts to extort property rights from victims. 18 U.S.C. 1951(a). Here, the evidence was sufficient to establish that petitioners attempted to obtain the right to control the terms on which the victims could conduct their business:

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[5] The courts of appeals also have held that "lack of economic motive does not constitute a defense to Hobbs Act crimes." *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d at 1350; see also *Libertad* v. *Welch*, 53 F.3d at 438 n.6 (extortion proven where "the record clearly shows that [the defendants] used force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinics from conducting their normal, lawful activities"); *United States* v. *Lewis*, 797 F.2d 358, 364-365 (7th Cir. 1986) ("[T]he defendant would have violated § 1951 if, for example, he had simply demanded that [the victim] burn $1 million in cash."), cert. denied, 479 U.S. 1093 (1987).

> [T]here was ample evidence that the attacks themselves were construed as threats of additional attacks on the facilities, and on persons associated with them, in the event that the facilities failed to give up their abortion practices. * * * [T]he jury easily could have concluded that reasonable persons in the victims' positions would have perceived the butyric acid attacks to be part of a pattern of violence, intimidation, and threats whose goal was to cause the attacked facilities to cease the business of providing abortion services. The jury was entitled to conclude that [petitioners], given their long history of protests against Planned Parenthood and Yoffa, knew that the victims would have such a perception, specifically sought to create such a perception, and knowingly endeavored to exploit their victims' fears.

Pet. App. 24a-25a; see also *id.* at 21a. The court of appeals therefore correctly concluded that, "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.* at 21a.[6]

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[6] Petitioners err in relying (Pet. 9) on *United States* v. *Enmons*, 410 U.S. 396 (1973), for the proposition that an extortionist must be motivated by financial gain. In *Enmons*, this Court held that extortion under the Hobbs Act did not proscribe the use of force to achieve *legitimate* collective-bargaining demands. The Court rested its holding on the ground that the use of force was not "wrongful" under the Act, because the union protesters had a lawful claim to the property at issue, *i.e.*, "the wages to which they are entitled in compensation for their services." 410 U.S. at 400.

Petitioners also err in contending (Pet. 3) that the court of appeals' interpretation of "obtaining" under the Hobbs Act "convert[s] that statute into a ban on all unlawful protest activities." The court of appeals merely held that the Hobbs Act applies to defendants who engage in violent activity or threats of such activity in order to force their victims to abandon their property rights. Nothing in the court of appeals' decision suggests that other illegal protest activity, such as simple trespass, or other conduct taken without a purpose to force the victim to abandon his property rights, would constitute a Hobbs Act violation.

c. Petitioners further contend (Pet. 18) that the government did not prove that the victims voluntarily surrendered their property rights, and therefore did not prove the element of "consent." The court of appeals, however, properly rejected that contention. As discussed, extortion occurs when the victim is forced to choose between relinquishing something of value or suffering harm or threatened harm to himself or his property, and the terms of the Hobbs Act apply to attempts. There was more than ample evidence to support the jury's finding that petitioners "sought to force the closure of the attacked health facilities by having Planned Parenthood and Yoffa choose to abandon their rights rather than risk further attacks." Pet. App. 22a. That factbound conclusion merits no further review.

Although the Court also noted that New York state courts had similarly construed the crime of extortion not to extend to militant union activities unless the accused received a financial payoff, *id.* at 406 n.16, the Court did not suggest, much less purport to hold, that the Hobbs Act requires the defendant to act with an intent to confer an economic benefit on himself or others.

d. Petitioners also argue (Pet. 19-20) that their conduct did not constitute the "use of actual or threatened force, violence, or fear." That factbound contention too lacks merit. Petitioners' conduct went far beyond "[c]ivil disobedience and social or political pressure tactics." Pet. 20. As the court of appeals explained, petitioners' conduct "had an immediate physical impact on [the victims'] facilities, sufficiently severe to necessitate massive evacuations of patients and clinic personnel" and "caused a number of those persons to experience serious physical symptoms and resulted in significant property damage to both facilities." Pet. App. 24a. Those actions clearly constituted actual force and violence under the Hobbs Act.

e. Petitioners also argue (Pet. 20-22) that their conduct was not "wrongful" because it was motivated by a legitimate goal. They further fault (Pet. 7, 20) the court of appeals for not addressing the element of wrongfulness. Petitioners, however, did not contest that element before the court of appeals and they therefore have waived the issue. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' argument is without merit. In *United States* v. *Enmons*, 410 U.S. 396, 400 (1973), this Court held that the term "'wrongful' * * * limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." The Court in *Enmons* further held that the use of violence by union members and officials to force their employer to pay "higher wages in return for genuine services which the employer seeks" was not wrongful under the Hobbs Act because the employees were acting under claim of right. *Ibid.*; see also note 6, *supra*. By contrast, petitioners in this case caused a

hazardous substance to be poured onto the premises of reproductive health service clinics in order to cause damage to the property and force those facilities to close. Pet. App. 3a-4a, 52a. Because petitioners had no rightful claim to the victims' property interests, their objectives were illegitimate and therefore "wrongful" under the Hobbs Act.[7]

2. Petitioners next contend (Pet. 26) that the district judge should have recused himself because his wife allegedly donated money to Planned Parenthood and the judge, during oral argument on Arena's recusal motion, inquired whether Arena wanted a Catholic judge. Those factbound contentions are without merit and warrant no further review.

As the court of appeals explained, "there was no reasonable basis for questioning [the district judge's] impartiality," and petitioners presented no evidence to support a claim of bias. Pet. App. 30a. The court of appeals explained that Planned Parenthood, though a victim, was not a party to the action and that any contribution by the judge's wife to the organization would not constitute a financial interest in the organization. *Ibid.* Similarly, the judge's inquiry into whether Arena wanted a Catholic judge does not indicate bias. The judge was simply trying to determine the grounds on which Arena sought recusal. See *id.* at 30a-31a.

3. Petitioner Arena finally contends (Pet. 26-29) that the court of appeals improperly rejected his claim of

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[7] Also for the first time in this Court, petitioner Arena relies (Pet. 23-24) on principles of avoidance of constitutional difficulties and federalism. Those arguments lack merit. It is well established that extortionate conduct affecting interstate commerce is "within federal legislative control," *Green*, 350 U.S. at 420-421, and that violence is not protected First Amendment activity, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993).

ineffective assistance of counsel. He contends (Pet. 28) that his counsel was deficient because he did not seek the immediate recusal of the judge, he conceded "key points relative to [the] Hobbs Act," and he "sought to eradicate references to abortion throughout the record."[8] Those factbound contentions do not warrant this Court's review.

In order to demonstrate ineffective assistance of counsel, a defendant must show that counsel's conduct was outside of the "wide range of reasonable professional assistance" and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland* v. *Washington*, 466 U.S. 668, 689, 695 (1984). Petitioner met neither of those requirements.

The court of appeals correctly found that counsel's Hobbs Act concessions, *i.e.*, that there was a nexus to interstate commerce and that Campbell had committed the attacks in conjunction with Arena, as well as counsel's decision not to emphasize Arena's anti-abortion views, all were reasonable trial strategies. Pet. App. 26a-27a. The same conclusion is warranted with respect to counsel's delay in seeking recusal of the judge; that is particularly true in light of the court of appeals' affirmance of the district judge's refusal to recuse himself. See *id.* at 29a-31a. Finally, Arena does

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[8] Arena also complains (Pet. 27-28) that the district court improperly accused him of seeking withdrawal of his counsel for the purpose of delaying trial. The court of appeals properly concluded (Pet. App. 28a-29a), however, that Arena's Sixth Amendment rights were not violated when the district judge refused to permit Arena's counsel to withdraw on the eve of trial. Indeed, Arena openly and repeatedly acknowledged to the district court that he was attempting to delay the trial and to have the district judge recuse himself. See *id.* at 28a.

not contend that any of the alleged deficiencies by his counsel were prejudicial. Nor could he make such a showing. The government presented overwhelming evidence of petitioners' guilt. Campbell testified that the attacks occurred as charged, *id.* at 4a, and Arena himself "had pleaded guilty in state court to the exact conduct that was at issue in the present case," *id.* at 26a. In those circumstances, the court of appeals properly rejected Arena's claim of ineffective assistance of counsel. *Id.* at 25a-31a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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